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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DESIREE ALAYNA CRUDER,

Defendant and Appellant.

F072625

(Super. Ct. No. F13903072)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Jon N. Kapetan, Judge.

Lauren E. Dodge, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Franson, J. and Smith, J.

Appellant Desiree Alayna Cruder appeals from the denial of her petition for resentencing under Penal Code section 1170.18,¹ seeking modification of the sentence imposed on her conviction for unlawfully driving or taking a vehicle (Veh. Code, § 10851). Appellant contends that her conviction under Vehicle Code section 10851 is eligible for resentencing under Proposition 47 generally, that her petition factually demonstrated eligibility, and that the trial court should have permitted her the opportunity to offer evidence regarding the value of the stolen vehicle. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 1, 2013, the victim in this case reported her 1993 green Ford Escort had been stolen from the front of her residence. On April 2, 2013, at approximately 1:32 a.m., a Fresno Police Department officer conducted a traffic stop after spotting the stolen vehicle. Appellant was the sole occupant of the vehicle. When questioned, appellant admitted to stealing the vehicle.

On December 19, 2013, appellant pled nolo contendere to one count of unlawfully driving or taking a vehicle. Appellant received a five-year sentence.

On March 19, 2015, appellant filed a one-page petition for resentencing under Proposition 47. No opposition was filed and, at least according to the record provided on appeal, no hearing was held on appellant's petition. Rather, the trial court denied appellant's petition with prejudice on the ground appellant was ineligible for relief "as his or her conviction(s) do not qualify for relief" under the relevant statutory code.

This appeal timely followed.

DISCUSSION

Appellant argues that, on its face, a violation of Vehicle Code section 10851 is a theft offense, subject to resentencing under section 1170.18. Appellant further argues

¹ All further statutory references are to the Penal Code unless otherwise noted.

that treating a conviction for theft of an automobile under Vehicle Code section 10851 as a felony while other similar property thefts are treated as misdemeanors under section 490.2 would create constitutional difficulties by violating equal protection principles. We have previously addressed both issues in *People v. Saucedo* (2016) 3 Cal.App.5th 635 (*Saucedo*), review granted November 30, 2016, S237975.² In *Saucedo* we held that Vehicle Code section 10851 is not affected by the changes enacted through Proposition 47 and that no equal protection violation arises from the different potential punishments for, or the failure to grant retroactive sentencing relief to, those convicted under Vehicle Code section 10851. (*Saucedo, supra*, at pp. 644-650.) We see no reason to depart from those rulings here. Because Vehicle Code section 10851 is not by its nature a theft offense, its exclusion from Proposition 47 confirms there was no intent to modify the punishment scheme separately set forth for the crime of unlawfully driving or taking a vehicle.

Appellant also argues her petition, when considered with her case file, demonstrates sufficient eligibility for relief to warrant a hearing on the value of the stolen vehicle. The initial burden of proof is upon appellant to demonstrate she is eligible for relief. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [“We think it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts, upon which his or her eligibility is based.”]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th, 444, 449 [burden on petitioner to show value of stolen property was less than \$950]; *People v. Johnston* (2016) 247 Cal.App.4th 252, 258 [petition properly denied where defendant failed to satisfy burden of showing value of property was less than \$950].) As the trial court’s eligibility determination is factual in nature, we review

² Effective July 1, 2016, California Rules of Court, rule 8.1115(e)(1) was amended to provide that a published opinion of a Court of Appeal has no binding or precedential effect once the matter is pending review in the Supreme Court and “may be cited for potentially persuasive value only.”

that determination for substantial evidence. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960; see also *People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331; *People v. Rivas-Colon, supra*, 241 Cal.App.4th at p. 452, fn.4 [“ ‘[T]he basic structure of Proposition 47 is strikingly similar to Proposition 36’ and ‘much of the appellate interpretation of Proposition 36 is likely relevant in the interpretation of Proposition 47.’ ”].)

In this case, the record shows that appellant possessed and drove the stolen vehicle the day after it was reported stolen. This fact is sufficient for the trial court to conclude appellant was convicted of the taking offense portion of Vehicle Code section 10851, and not the theft provision exclusively. Appellant’s argument, the charging document shows only a theft offense was committed, because it charges appellant “did unlawfully drive and take a certain vehicle then and there the personal property of Relonda Dale Ross without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle,” is not persuasive. The language matches the general structure of the relevant statute and, as we noted in *Sauceda*, taking a vehicle with the intent only to temporarily deprive the owner of their property would not qualify as theft, but would constitute a taking offense under Vehicle Code section 10851. (*Sauceda, supra*, 3 Cal.App.5th at pp. 646.) As appellant’s petition did not demonstrate eligibility, even when considering available evidence, the trial court properly denied the petition and there is no reason to remand for proceedings to demonstrate the value of the stolen vehicle.

DISPOSITION

The order is affirmed.